

## E-ALERT | Antitrust / China Practice

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### CHINESE ANTITRUST REGULATOR ISSUES RULES REGARDING "SIMPLE" TRANSACTIONS

China's Anti-Monopoly Law ("AML") has required review and approval of proposed transactions that meet the AML's filing thresholds by the Ministry of Commerce ("MOFCOM") since August 2008. MOFCOM has publicly acknowledged that its merger review process under the AML often results in delayed clearances, including for transactions that raise few or no substantive competition concerns. The agency has repeatedly pledged to address this concern, and to that end released the final version of its Interim Regulation on Standards Applicable to Simple Concentrations of Undertakings ("Simple Transaction Regulation") on February 14, 2014. This much-anticipated regulation, which became effective upon its release, sets forth criteria according to which MOFCOM may classify a transaction as "simple." Such transactions may qualify for different treatment under the agency's merger control regime. MOFCOM has indicated that it is still developing the details of that simplified treatment and will provide them in future regulations.

#### SIMPLE TRANSACTIONS

The Simple Transaction Regulation provides that the following may be regarded as "simple" transactions:

- Transactions between horizontal competitors (those that compete in the same relevant market), if the combined market share of all parties to the transaction is below 15%;
- Transactions between parties with a vertical relationship, if the combined market share in the relevant upstream and downstream markets is below 25%;
- Transactions where there is neither a vertical nor a horizontal relationship between the parties and neither party has a share of 25% or more in any relevant market;
- Transactions that create off-shore joint ventures that have no business activities in China;
- Acquisitions of off-shore targets that have no business activities in China; and
- Reductions of the number of controlling shareholders of joint ventures from two or more parties to one (or more) party.

#### EXCEPTIONS

If MOFCOM determines that any of the following situations exist, a transaction shall not be deemed a "simple" case, even if it falls into one of the six criteria above:

- Cases involving the reduction of the number of controlling shareholders of a joint venture, if the final controlling party is a competitor of the joint venture in the same market;
- If the relevant markets are difficult to define;
- If the transaction might negatively impact market entry and technology improvement;

- If the transaction might negatively impact consumers or other companies;
- If the transaction might negatively impact China's economic development; or
- If MOFCOM determines that the transaction may adversely affect competition in a relevant market.

These exceptions, which give MOFCOM considerable flexibility in deciding whether to classify a transaction as "simple," could result in substantial uncertainty for parties planning transactions that may require a notification under the AML. For example, if MOFCOM must first determine whether any of these exceptions apply before it may deem a transaction "simple," this could add further delay to what is often already a lengthy review process. Alternatively, if MOFCOM may decide during its substantive review of a transaction that the relevant markets involved are "difficult to define" or that the transaction, simple though it may be, might nevertheless have a negative impact on the Chinese economy, the parties' deal could lose its "simple" status, with as-yet unknown consequences for the investigation and the timing for clearance.

### REVOCATION OF "SIMPLE" STATUS

Finally, MOFCOM can revoke a transaction's "simple" status if:

- The filing parties withhold information or provide false or misleading information;
- Third parties claim that the transaction can eliminate or restrict competition and provide sufficient evidence; or
- MOFCOM discovers material changes in the relevant market or the transaction terms.

MOFCOM's stated goal is to simplify its review of transactions that are not likely to raise serious competition issues. However, the fact that third parties will still play an important role in the review of even "simple" cases could be significant. Third parties — such as trade associations, competitors, and other government agencies — can seek to influence MOFCOM's decision by providing input on issues such as market definition and the potential effects of transactions. There is some risk that MOFCOM, faced with this information, could decide to rescind its determination that a transaction is "simple," which could cause significant delay and introduce a degree of uncertainty into the clearance process.

### WORK IN PROGRESS

Although MOFCOM has finalized the criteria for classifying transactions as "simple," important details remain under development by the agency. For example:

- The new regulation does not explain the process or timing according to which MOFCOM will determine whether a transaction is "simple" — whether parties must request it during pre-filing consultations, for example, and await MOFCOM's decision before filing their notification and starting the waiting period, or whether they may assert that theirs is a simple transaction and proceed accordingly unless MOFCOM rejects their assertion.
- The new regulation does not explain how the review process for simple transactions will differ from that for other transactions — whether the required notification will be abbreviated, whether MOFCOM will ensure a clearance decision before the end of the initial waiting period (30 days), etc.

MOFCOM has indicated that it will provide further clarifications in future regulations.

In issuing the Simple Transaction Regulation, MOFCOM has begun to fulfill its promise to take concrete steps to address concerns that its merger clearance decisions are often delayed, even in matters that raise no competition issues. Until the agency issues further procedural rules, however, it will be difficult to determine how MOFCOM will handle the review of simple cases in practice, or whether the agency will succeed in shortening the time needed for clearance or in reducing the burdens that the current process places on parties and on its own resources.

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